## SIAW SWEE MIE v. LEMBAGA LEBUH RAYA MALAYSIA

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
NALLINI PATHMANATHAN JCA
ZABARIAH MOHD YUSOF JCA
[CIVIL APPEAL NO: J-02(IM)(NCVC)-840-04-2017]
12 JANUARY 2018

***CIVIL PROCEDURE:*** *Striking out – Originating summons – Allegation that originating summons replicated earlier proceeding – Whether facts and issue in originating summons same as earlier proceeding – Whether there were triable issues – Whether amounted to multiplicity of proceedings – Whether caught by principle of res judicata and estoppel – Whether abuse of court process – Rules of Court 2012, O. 18 r. 19(1)(a), (b), (c) & (d)*

A piece of land was compulsorily-acquired by the Government in accordance with the Land Acquisition Act 1960 ('the Act') for the construction of a highway. The appellant and two others ('the defendants') were the interested parties in the land while the respondent ('the plaintiff') was the paymaster. The enquiry was held by the land administrator ('the LA') and the valuer valued the land at RM19,700,000. Pursuant to the enquiry, the LA awarded the defendants a total of the said sum and the defendants accepted the compensation without objection. Four years later, after the compensation was fully-paid, the plaintiff obtained a consent order for extension of time to object to the award ('extension order'). The defendant named in the application for extension of time was the LA. The defendants were not made parties and were not aware of these proceedings. The plaintiff objected against the award by the LA and the objection was referred to the High Court. The defendants were listed as interest persons. The Judicial Commissioner ('the JC'), sitting with two assessors, held, *inter alia,* that there was an error in the valuation of the award and the defendants had been overpaid the sum of RM3,518,634 ('the overpaid sum') which amount was to be returned to the plaintiff ('the overpayment order') ('the earlier proceeding'). There was nothing on record to show that the extension and overpayment orders were served on the defendants. However, the LA wrote to all the defendants at one common address, requesting them to refund the overpaid sum but no payment was forthcoming. By way of an originating summons ('the OS') the plaintiff commenced an action against the defendants, seeking for the overpaid sum. The appellant applied to strike out the OS pursuant to O. 18 r. 19(1)(a), (b), (c) and (d) of the Rules of Court 2012. In dismissing the appellant's application, the JC held that the OS was not a plain and obvious case for striking out as there were triable issues which warranted a full hearing. Hence, the present appeal.

**Held (allowing appeal)**
**Per Tengku Maimun Tuan Mat JCA delivering the judgment of the court:**

**(1)** In the earlier proceeding, the same issue was canvassed *ie*, whether the LA was wrong in making the award. The issue was answered in the affirmative and as was made crystal-clear in the overpayment order, it had been decided that the defendants were to return the overpaid sum. That being the case, the OS amounted to a multiplicity of proceedings and was caught by the principle of estoppel and *res judicata*. (para 26)

**(2)** The plaintiff could have and ought to have joined the appellant in the earlier proceeding but failed to do so. The OS, which replicated the earlier proceeding, was to enable the plaintiff to 'rectify' or 'regularise' the omission in not having the appellant as a party to respond to the plaintiff's case of wrong evaluation and award by the LA. On that premise, the filing of this OS, which was identical and rested on the same facts and issues as the earlier proceeding, was clearly an abuse of process of court and ought to have been struck out. (paras 26 & 27)

**(3)** The JC, in the earlier proceeding, lacked the jurisdiction to pronounce the overpayment order affecting the rights of the appellant, who was not properly before the court. The overpayment order, insofar as it purported to deprive the appellant of the compensation, already paid pursuant to the enquiry for the land acquisition, made in breach of natural justice, was therefore wholly irregular, null and void and had no effect on the appellant. On *locus standi*, whilst the plaintiff, as paymaster, may have the *locus* to institute the land reference proceedings, the plaintiff had no *locus* to bring this OS against the appellant. This was because all the dealing for the land acquisition were between the LA and the appellant. The overpayment order ought to be enforced by the LA. (paras 40 & 42)

**(4)** The OS, being an action filed by the plaintiff to enforce the overpayment order, which was null and void against the appellant, was an abuse of the court process and was obviously unsustainable. (para 50)

***Bahasa Malaysia*** *Headnotes*

Sebidang tanah diambil secara wajib oleh Kerajaan selaras dengan Akta Pengambilan Tanah 1960 ('Akta') bagi pembinaan lebuh raya. Perayu dan dua lagi ('defendan-defendan') adalah pihak yang memiliki kepentingan atas tanah manakala responden ('plaintif') adalah jurubayar gaji. Inkuiri dijalankan oleh pentadbir tanah ('PT') dan penilai menilai tanah pada RM19,700,000. Susulan inkuiri ini, PT mengawardkan defendan-defendan jumlah tersebut dan defendan-defendan menerima pampasan ini tanpa bantahan. Empat tahun kemudian, selepas pampasan telah dibayar

sepenuhnya, plaintif memperoleh perintah kebenaran lanjutan masa untuk membantah award tersebut ('perintah lanjutan'). Defendan yang dinamakan dalam permohonan lanjutan masa ini adalah PT. Defendan-defendan tidak dijadikan pihak-pihak dan tidak sedar akan prosiding ini. Plaintif membantah terhadap award PT dan bantahan tersebut dirujuk pada Mahkamah Tinggi. Defendan-defendan disenaraikan sebagai orang-orang berkepentingan. Pesuruhjaya Kehakiman ('PK'), bersidang bersama-sama dua orang penilai, memutuskan, antara lain, terdapat kekhilafan dalam penilaian award dan defendan-defendan diberi bayaran lebih sebanyak RM3,518,634 ('jumlah lebih bayaran') yang harus dipulangkan kepada plaintif ('perintah lebih bayaran') ('prosiding terdahulu'). Tiada apa-apa dalam rekod untuk menunjukkan perintah lanjutan dan lebih bayaran diserahkan kepada defendan-defendan. Walau bagaimanapun, PT menulis kepada defendan-defendan dengan alamat sama, meminta agar mereka memulangkan jumlah lebih bayaran tetapi tiada bayaran dikemukakan. Melalui satu saman pemula ('SP'), plaintif memulakan tindakan terhadap defendan-defendan, menuntut jumlah lebih bayaran. Perayu memohon membatalkan SP bawah A. 18 k. 19(1)(a), (b), (c) dan (d) Kaedah-Kaedah Mahkamah 2012. Menolak permohonan perayu, PK memutuskan SP bukan kes yang jelas dan nyata untuk dibatalkan kerana wujud isu-isu untuk dibicarakan yang mewajarkan perbicaraan penuh. Maka timbul rayuan ini.

**Diputuskan (membenarkan rayuan)**
**Oleh Tengku Maimun Tuan Mat HMR menyampaikan penghakiman mahkamah:**

**(1)** Dalam prosiding terdahulu, isu sama dikemukakan iaitu sama ada PT terkhilaf dalam mengeluarkan award tersebut. Isu ini dijawab secara afirmatif dan seperti yang dijelaskan secara terperinci dalam perintah lebih bayaran, diputuskan bahawa defendan-defendan perlu memulangkan jumlah lebih bayaran. Oleh itu, SP terjumlah sebagai kegandaan prosiding dan terikat oleh prinsip estopel dan *res judicata*.

**(2)** Plaintif boleh dan sepatutnya memasukkan perayu dalam prosiding terdahulu tetapi gagal berbuat demikian. Saman pemula tersebut, yang mengulang prosiding terdahulu, dibuat untuk membolehkan plaintif membetulkan atau mengubah ketinggalan tidak memasukkan perayu sebagai pihak untuk membalas kes salah nilai plaintif dan award oleh PT. Berdasarkan ini, pemfailan SP, yang serupa dan bersandar pada fakta-fakta dan isu yang sama dengan prosiding terdahulu, jelas satu salah guna proses mahkamah dan harus dibatalkan.

**(3)** Pesuruhjaya Kehakiman dalam prosiding terdahulu tidak berbidang kuasa mengisytiharkan perintah lebih bayaran menjejaskan hak-hak perayu yang tidak hadir di mahkamah. Perintah lebih bayaran, setakat yang menafikan perayu akan pampasan, yang telah dibayar berikutan

A inkuiri pengambilan tanah, dibuat dengan melanggar keadilan asasi, adalah, dengan itu tidak teratur, tidak sah dan terbatal sepenuhnya dan tiada kesan pada perayu. Tentang *locus standi*, walaupun plaintif, sebagai jurubayar gaji, mempunyai *locus* memulakan prosiding rujukan tanah, plaintif tiada *locus* memfailkan SP terhadap perayu. Ini kerana kesemua
B urusan pengambilan tanah adalah antara PT dan perayu. Perintah lebih bayaran sepatutnya dikuatkuasakan oleh PT.

**(4)** Saman pemula tersebut, iaitu satu tindakan yang difailkan oleh plaintif untuk menguatkuasakan perintah lebih bayaran yang tidak sah terhadap perayu, adalah satu salah guna proses mahkamah dan jelas tidak boleh
C dikekalkan.

**Case(s) referred to:**

*Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC* ***(refd)***

*Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC* ***(refd)***

D *Boustead Trading (1985) Sdn Bhd v. Arab Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC* ***(refd)***

*Kheng Chwee Lian v. Wong Tak Thong [1983] 2 CLJ 191; [1983] CLJ (Rep) 195 FC* ***(refd)***

*Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 5 CLJ 526 FC* ***(refd)***

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**Legislation referred to:**

Contracts Act 1950, s. 73

Land Acquisition Act 1960, ss. 5, 38(1), 40C, 43, 47(1)

Rules of Court 2012, O. 18 r. 19(1)(a), (b), (c), (d), O. 28 r. 4(3)

*For the appellant - M Thomas Philip & Aliff Benjamin; M/s Thomas Philip*

F *For the respondent - Yusri Kamarudin; M/s Zuri & Co*

*[Editor's note: For the High Court judgment, please see Lembaga Lebuhraya Malaysia v. Low Fook Lai & Ors [2019] 1 LNS 1117 (overruled).]*

*Reported by Najib Tamby*

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## JUDGMENT

**Tengku Maimun Tuan Mat JCA:**

**[1]** This was an appeal by the appellant ("the third defendant") against the order of the High Court in dismissing her application under O. 18 r. 19(1)(a),
H (b), (c) and (d) of the Rules of Court 2012 ("ROC") to strike out the respondent's ("the plaintiff's") originating summons.

**[2]** The originating summons dated 3 November 2016 against the third defendant and Low Fook Lai and Lee Chai Eng (the first and the second
I defendants) was for the following reliefs:

1. Bahawa Pihak Pentadbir Tanah telah membuat penilaian yang salah dalam terkhilaf menilai pampasan yang sepatutnya diberikan kepada Defendan-Defendan.

2. Bahawa Defendan perlu mengembalikan wang berjumlah RM3,518,634.00 jumlah lebihan pampasan yang telah diputuskan didalam perintah bertarikh 04.11.2011 kepada Pihak Pentadbir Tanah Daerah Johor Bahru.

3. Bahawa selain dari tuntutan diatas Plaintif juga memohon:

   (a) Kos tindakan ini ditanggung oleh Defendan.

   (b) Untuk Perintah-Perintah atau relief lain yang Mahkamah ini dapati sah dan adil.

**Background Facts**

**[3]** A piece of land described as GM920, Lot 190 Mukim Plentong, Johor Bahru ("the land") was compulsorily acquired by the Government in accordance with the Land Acquisition Act 1960 ("the Act"). The defendants were the interested parties in the land. The acquisition was for the construction of Senai-Desaru Expressway. The plaintiff was the paymaster. Notice of an enquiry to determine the award of compensation was issued by the land administrator *vide* Form E dated 13 June 2005. The enquiry was held by the land administrator on 18 July 2005.

**[4]** The record of proceedings before the land administrator showed that the plaintiff was not present at the enquiry. The defendants were present and one Zulifahalila binti Abas, the valuer from Jabatan Penilaian Johor Bahru valued the land at RM19,700,000.

**[5]** Pursuant to the enquiry, the land administrator awarded the defendants a total of RM19,700,000, the breakdown was as follows:

(i) The first defendant – RM6,158,000

(ii) The second defendant – RM6,771,000

(iii) The third defendant – RM6,771,000

**[6]** *Vide* Form H dated 18 July 2005, the defendants were notified of the award. Form H was sent to the first, the second and the third defendant's respective address, namely the first defendant at No. 8, Jalan Cokmar, Taman Seri Tebrau, 80050 Johor Bahru; the second defendant at No. 2, Jalan Padi Huma 3, Bandar Baru Uda, 81200 Johor and the third defendant at No. 8, Jalan Dian 14, Taman Munshi Ibrahim, 81200 Johor Bahru.

**[7]** The defendants accepted the compensation without objection. The compensation was fully paid on or around 29 September 2005.

**[8]** About four years later, on 7 October 2009, the plaintiff obtained a consent order for extension of time to object to the award. The defendant named in this application for extension of time was the land administrator. The defendants were not made parties and hence were not aware of this proceeding.

**[9]** On 23 October 2009, the plaintiff lodged Form N to object to the award made by the land administrator. Pursuant to s. 38(1) of the Act, the land administrator referred the said objection to the High Court *vide* Form O. In Form O, the defendants were listed as interested persons and notwithstanding the fact that the defendants were at different addresses as evident in the issuance of Form H by the land administrator, in Form O, the address for all the three defendants was stated as No. 8, Jalan Cokmar, Taman Seri Tebrau, 80050 Johor Bahru. As for the objection, the grounds stated in Form O were:

> Pampasan yang ditawarkan tidak mengikut prinsip-prinsip yang betul dan adil berdasarkan perbandingan harga tanah dipersekitaran yang mengakibatkan harga tanah tersebut terlalu tinggi. Pentadbir Tanah telah terkhilaf kerana award yang diberikan adalah tidak konsisten dengan award tanah-tanah lain dan terdapat unsur-unsur bias di mana award tanah tersebut berbeza dengan tanah-tanah lain yang terlibat.

**[10]** On 4 November 2011, having heard learned counsel for the plaintiff and the Assistant State Legal Adviser for the land administrator, the learned Judicial Commissioner sitting with two assessors held, *inter alia* that there was an error in the valuation of the award and that the defendants had been overpaid the sum of RM3,518,634 which amount was to be returned to the plaintiff (hereinafter the proceeding leading to the order dated 4 November 2011 will be referred to interchangeably as the earlier proceeding or the land reference proceeding).

**[11]** There was nothing on record to show that the order for the extension of time dated 7 October 2009 and the order dated 4 November 2011 on the overpayment were served on the defendants. Be that as it may, *vide* a letter dated 29 May 2012, the land administrator wrote to all the defendants at one common address of No. 8, Jalan Cokmar, Taman Seri Tebrau, requesting the defendants to refund RM3,518,634 to the plaintiff. No payment was forthcoming from the defendants.

**[12]** On 3 November 2016 the plaintiff filed this underlying action, which the third defendant applied to strike out.

**The Striking Out Application**

**[13]** Before the learned Judicial Commissioner, the third defendant contended that the originating summons was obviously unsustainable and ought to be struck out as the third defendant was not bound by and cannot be subjected to both the court orders for extension of time and the order of

overpayment. In this regard, the third defendant relied on *Kheng Chwee Lian v. Wong Tak Thong* [1983] 2 CLJ 191; [1983] CLJ (Rep) 195; [1983] 2 MLJ 320.

**[14]** It was further contended that the plaintiff had no legal right and/or any cause of action to bring the originating summons as it was not a proper plaintiff to claim for the purported overpayment. The proper party would be the land administrator. And as the plaintiff never took part in the proceedings before the land administrator for the determination of the compensation, the plaintiff was not entitled to belatedly object to the award and to subsequently file this originating summons.

**[15]** The third defendant also relied on the principle of issue estoppel and *res judicata* to argue that the originating summons ought to be struck out. By way of the originating summons, the plaintiff alleged that the valuation conducted and the compensation awarded by the land administrator to the defendants was erroneous. The very same issue, namely whether the valuation and award by the land administrator was correct was raised, considered and determined by the High Court in the earlier proceeding.

**[16]** Further, it was submitted for the third defendant that the originating summons was filed by the plaintiff to remedy its failure to name the defendants in the earlier proceeding.

**[17]** The plaintiff on the other hand argued that the plaintiff has a cause of action against the defendants on the grounds, *inter alia,* that the court had on 4 November 2011 made an order on the overpayment of compensation and it would be against public policy to allow the third defendant to keep the over-paid compensation as it involves the taxpayer's money. The plaintiff's claim, submitted learned counsel, was for money had and received.

**[18]** The learned Judicial Commissioner held that the originating summons was not a plain and obvious case for striking out under O. 18 r. 19 of the ROC as there were triable issues which warrant a full hearing of the originating summons, namely:

(i) whether the third defendant was never made a party and therefore, the third defendant was not bound by the order dated 4 November 2011;

(ii) whether the plaintiff had the *locus* to bring an action against the defendant based on the order dated 4 November 2011;

(iii) whether the alleged non-compliance of the provisions in the Act by the land administrator could vitiate the entire land reference proceeding and the order dated 4 November 2011; and

(iv) whether the court is the right forum to declare the order dated 4 November 2011 as invalid.

**[19]** The learned Judicial Commissioner also held that the originating summons raises a pertinent question to be considered, namely whether the defendants can keep the over-compensated amount notwithstanding that the court had *vide* the order dated 4 November 2011 held that the defendants had been over-compensated in the amount of RM3,518,634. Based on this pertinent question, His Lordship opined that the originating summons brought by the plaintiff against the defendants was not frivolous or vexatious and certainly was not an abuse of the court process.

**[20]** The third defendant's application to strike out the originating summons was thus dismissed, hence the appeal.

**[21]** For the reasons that follow, we had unanimously allowed the third defendant's appeal.

**The Appeal**

**[22]** The gist of the third defendant's submissions before us were:

(i) The primary basis of the plaintiff's claim is the enforcement of the order dated 4 November 2011 which arose from the order for the extension of time and the land reference proceeding.

(ii) It was not disputed that the third defendant was never made a party to those proceedings.

(iii) It is trite law that an order made by the court is only binding on the parties to the particular action, unless non-parties have agreed to be bound by a particular order.

(iv) It follows that the plaintiff has no reasonable cause of action against the third defendant.

(v) The only party with the *locus standi* to commence the underlying action is the land administrator, not the plaintiff.

(vi) The order dated 4 November 2011 is only enforceable between the plaintiff and the land administrator.

(vii) The plaintiff should have applied to enforce the order dated 4 November 2011 against the land administrator who may then seek payment from the defendants separately.

(viii) Section 43 in respect of notice relating to reference and ss. 40C and 47 in respect of the decision-making process were not complied with, rendering the order dated 4 November 2011 invalid.

(ix) The underlying action which is separate from the land reference proceeding is clearly within the jurisdiction of the High Court.

(x) The principle of *res judicata* and multiplicity of proceedings prevent re-litigation of similar issues which had been determined in the land reference proceeding.

(xi) Section 73 of the Contracts Act 1950 and the common law doctrine of unjust enrichment is not applicable.

**[23]** For the plaintiff, it was submitted that the High Court was correct in refusing to strike out the originating summons. Essentially, the position taken by the plaintiff was that in the light of the order dated 4 November 2011, the third defendant must refund the compensation which was overpaid.

**Our Decision**

**[24]** Although the third defendant's application was made under O. 18 r. 19(1)(a), (b), (c) and (d) of the ROC, for purposes of this judgment, we will only deal with O. 18 r. 19(1)(d) of the ROC where the originating summons may be struck out if it was an abuse of the process of the court.

**[25]** *Vide* the originating summons, the plaintiff was seeking for the determination of the following issues, namely whether the valuation and award by the land administrator was correct and whether the defendants were required to return the amount of RM3,518,634.

**[26]** To recap, in the earlier proceeding, the same issue was canvassed ie, whether the land administrator was wrong in making the award. The issue was answered in the affirmative and as made crystal clear in the order dated 4 November 2011, it had been decided that the defendants were to return the RM3,518,634. That being the case, we agreed with learned counsel for the third defendant that the originating summons amounted to a multiplicity of proceedings and was caught by the principle of estoppel and *res judicata*. The plaintiff could have and ought to have joined the third defendant in the earlier proceeding but it failed to do so.

**[27]** The originating summons which replicated the earlier proceeding was to enable the plaintiff to 'rectify' or 'regularise' the omission in not having the third defendant as a party to respond to the plaintiff's case of wrong valuation and wrong award by the land administrator in the earlier proceeding. On that premise, the filing of this originating summons which was identical and rested on the same facts and issue as the earlier proceeding was clearly an abuse of the process of the court and ought to have been struck out (see *Boustead Trading (1985) Sdn Bhd v. Arab Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283; [1995] 3 MLJ 331; *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189).

**[28]** As a matter of fact, there would have been no necessity for the plaintiff to institute another proceeding seeking for similar reliefs which had been decided by the court in its favour. Armed with the order dated 4 November 2011, one would have expected the plaintiff to issue execution proceedings against the third defendant to recover the amount already adjudged in favour of the plaintiff.

**[29]** The problem with the earlier proceeding, if we may say so, was because the third defendant was not given the right to be heard in respect of the plaintiff's case that the award made by the land administrator was erroneous. It cannot be denied that the third defendant was affected by the order dated 4 November 2011. The third defendant, having received the compensation in full and after a long lapse of time, now has to refund part of the compensation to the paymaster plaintiff on account that the land administrator was wrong in making the award of compensation.

**[30]** We reckoned a valuer must have given evidence in the earlier proceeding to the effect that the valuation and the award of the land administrator on 18 July 2005 were erroneous. The law as encapsulated in s. 5 of the Act allows cross-examination of the valuer by the third defendant. The third defendant however was not able to do so due to the absence of any notice given to her on the earlier proceeding.

**[31]** The learned Judicial Commissioner held that the issue whether the third defendant was never made a party and therefore was not bound by the order dated 4 November 2011 warrants a full hearing of the originating summons. With respect, we disagreed. We have perused the affidavit in support of the plaintiff's originating summons. There was conspicuously absent any averment on the fact that notice relating to the earlier proceeding was served on the third defendant (appeal record B & C vol. 2: pp. 41-45).

**[32]** In reply to the plaintiff's originating summons and in support of her application to strike out the originating summons, the third defendant did aver that she was never served with the necessary documents in respect of the earlier proceeding (appeal record B & C vol. 2: p. 58). The plaintiff merely denied the third defendant's averment but failed to exhibit the documents or to state the details as to prove service of the earlier proceeding on the third defendant (appeal record B & C vol. 2: p. 63).

**[33]** The plaintiff nevertheless had exhibited Form H and Form O which disclosed that while Form H for the notice on the award and compensation was sent to the third defendant at the correct address, Form O was sent to the wrong address (appeal record B & C vol. 2: pp. 91-93 and 105). From the plaintiff's own exhibits, there was uncontroverted evidence that the third defendant had no knowledge of; had not been served with the necessary

documents and had not been made a party to the earlier proceeding. In the circumstances, a full hearing to determine whether or not the third defendant was a party to the previous proceedings would serve no purpose.

**[34]** At this juncture, it is perhaps pertinent to note that unless the court made an order under O. 28 r. 4(3) of the ROC that the just, expeditious and economical disposal of the originating summons can best be secured by hearing the originating summons on oral evidence (which we found no such order), the originating summons would remain to be heard and determined by the court *via* affidavit evidence. The affidavits clearly established that the third defendant was not a party to the earlier proceeding. This issue did not merit further investigation.

**[35]** Now on the question whether the third defendant not being a party was bound by the order dated 4 November 2011.

**[36]** In *Kheng Chwee Lian (supra)*, the respondent (plaintiff) had bought a half share in a piece of land from the appellant (defendant) and had paid the purchase price. Subsequently, the plaintiff was induced into signing another agreement under which he was allocated a small portion of the land. The plaintiff alleged that he was induced by the false representation of the defendant to sign the second agreement.

**[37]** The plaintiff applied to the High Court for a declaration that he was the owner of one-half of the land and an order that the land be subdivided. However, portions of the land had been transferred by the defendant to her sons. In taking out the writ against the defendant, the plaintiff did not name the sons as co-defendants. The High Court declared the plaintiff as the owner of one-half of the land. The High Court also ordered that the land be so subdivided that the plaintiff should retain the area he now occupies plus an additional area so as to make up his total holding to be one-half of the entire land and that the remaining area should go to the defendant and her five sons.

**[38]** The defendant appealed to the Federal Court. At the hearing of the appeal, the sons were given leave to intervene. The interveners argued that the order of the learned judge clearly affected their registered title and that they had been denied a hearing. It was further argued that an order so made was wholly irregular. The Federal Court allowed the appeal by the interveners and set aside the order of the High Court directing that the plaintiff be entitled to one-half of the entire area of the said land.

**[39]** Seah FJ, speaking for the Federal Court said at p. 200 (CLJ); p. 323 (MLJ):

> In our judgment, the court below has no jurisdiction inherent or otherwise, over any person other than those properly brought before it, as parties or as persons treated as if they were parties under statutory provisions. ... The terms "judgment" and "order" in the widest sense may

A be said to include any decision given by a court on a question or questions at issue between the parties to a proceeding properly before the court [see para 501 of *Halsbury's Laws of England* (4th ed.) Vol. 26 at page 237]. And at page 550 the following passages appear:

> Subject to appeal and to being amended or set aside, a judgment
B is conclusive as between the parties and their privies and is conclusive evidence against all the world of its existence, date and legal consequences.

> We are constrained to agree with the submission of learned counsel for the interveners that the order of the learned judge was wholly irregular insofar as it purports to affect the registered title, share and interest of the
C said interveners in the said land when they had not been made parties or given a full opportunity of taking part in the proceedings in the court below. If the respondent had wanted the whole one-half share in the said land in pursuance of the first agreement after knowledge of the registration of these transfers by the appellant to her five sons, he ought
D to have joined the sons .. as co-defendants in the proceeding.

**[40]** Applying the above principle, the learned Judicial Commissioner in the earlier proceeding lacked the jurisdiction to pronounce the order dated 4 November 2011 affecting the rights of the third defendant who was not properly before the court. The order dated 4 November 2011 insofar as it
E purports to deprive the third defendant of the compensation already paid pursuant to the enquiry for the land acquisition, made in breach of natural justice was therefore wholly irregular, null and void and had no effect on the third defendant (see also *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393).

F **[41]** The learned Judicial Commissioner ruled that the question whether the third defendant can keep the over-compensated amount must be resolved *via* a full hearing. In our judgment, whether or not the third defendant can keep the over-compensated amount depends on the validity of the order dated 4 November 2011. In the light of the principle enunciated in *Kheng*
G *Chwee Lian (supra),* the order clearly was not a valid and regular order. Hence, the issue whether the third defendant can keep the overpaid compensation and the need for a full hearing to determine such issue did not arise.

**[42]** On *locus standi*, whilst the plaintiff as the paymaster may have the *locus*
H to institute the land reference proceedings, we opined that the plaintiff had no *locus* to bring this originating summons against the third defendant. This is because all dealings for the land acquisition were between the land administrator and the third defendant. If at all, the order dated 4 November 2011 ought to be enforced by the land administrator. In fact, that was the case
I as evident by the fact that having obtained the order dated 4 November 2011,

it was not the plaintiff who demanded refund of the over-paid compensation (appeal record B & C vol. 2: p. 111). The demand was made by the land administrator *vide* a letter to the third defendant (*albeit* using a wrong address) for the refund to be made to the plaintiff.

**[43]** Another issue which the learned Judicial Commissioner found to warrant a full hearing of the originating summons was whether the non-compliance of the provisions of the Act vitiated the earlier proceeding and the order dated 4 November 2011.

**[44]** Section 40C stipulates that the opinion of each assessor on the various heads of compensation claimed by all persons interested shall be given in writing and shall be recorded by the judge. Section 43 requires that notice relating to reference to court be served on the interested person whereas s. 47(1) states that every decision made on the award shall be in writing signed by the judge and the assessors.

**[45]** Undoubtedly, in the instant case, there was a breach of s. 43 as the third defendant was never served with the notice in respect of the land reference proceeding. There was also a breach of s. 40C of the Act as there was no record by the judge of the opinion of the assessors. Neither was there a decision signed by the judge and the assessors on the award or over-payment of compensation as mandated under s. 47(1) of the Act.

**[46]** In the Federal Court case of *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526; [2017] 3 MLJ 561, which we respectfully follow, Zainun Ali FCJ said at p. 577 (CLJ); p. 612 (MLJ):

> [189] ... s. 40C of the Act forms an important component of the decision making process in land reference proceedings. It sets out the requirements to be observed by the assessors and the judge before decision is arrived at. Therefore non-observance of s. 40C of the Act amounts to a misdirection of the court which renders the decision invalid. Suffice to say that for this reason alone, this appeal must be allowed.

**[47]** Having regard to the affidavits and to the pronouncement of the Federal Court above, we were unable to uphold the learned Judicial Commissioner's ruling that it was necessary for the parties to deliberate in the originating summons proceeding to determine the issue whether the non-compliance of the provisions in the Act could vitiate the land reference proceeding and the order dated 4 November 2011. Without the need for a full hearing of the originating summons, the issue ought to be resolved against the plaintiff on the authority of *Semenyih Jaya (supra).* Non-observance of s. 40C of the Act, in particular, had vitiated the land reference proceeding and had rendered the order dated 4 November 2011 invalid.

**[48]** For completeness, the other issue found by the learned Judicial Commissioner as to warrant a full hearing of the originating summons was whether the High Court was the right forum to declare the order dated 4 November 2011 invalid. We failed to see any jurisdictional impediment for the High Court to hear the originating summons. Hence this cannot be an issue for determination at the full hearing of the originating summons.

**[49]** Given our above findings, we do not see the need to deal with the issues of unjust enrichment and monies had and received raised by the third defendant and the plaintiff respectively which in the event were no longer relevant.

**Conclusion**

**[50]** The originating summons, being an action filed by the plaintiff to enforce the order dated 4 November 2011 which was null and void against the third defendant was an abuse of the process of the court and was obviously unsustainable.

**[51]** For the above reasons, the appeal was unanimously allowed with costs.